

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

LETICIA GARZA GALVAN, ET AL.,)	CASE NO: 7:18-CV-00113
)	
Plaintiffs,)	CIVIL
)	
vs.)	McAllen, Texas
)	
ROLANDO B. PABLOS, ET AL.,)	Tuesday, March 19, 2019
)	
Defendants.)	(2:58 p.m. to 3:18 p.m.)

PRETRIAL CONFERENCE

BEFORE THE HONORABLE RICARDO H. HINOJOSA,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiffs: JERAD W. NAJVAR, ESQ.
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McAllen, Texas; Tuesday, March 19, 2019; 2:58 p.m.

(Call to Order)

THE COURT: Next is Civil Action Number M-18-00113, *Leticia Garza Galvan and Martie Garcia Vela versus Rolando B. Pablos and others.*

Can you have announcements for the parties as to who's here?

MR. NAJVAR: Yes, your Honor. Jerad Najvar for the Plaintiffs, and I'm here with my associate, Austin Whatley.

MR. HUDSON: Eric Hudson on behalf of Secretary Whitley. I'm with the Office of the Attorney General.

THE COURT: Okay. And I guess this will be substituted for Mr. Pablos; is that right?

MR. HUDSON: That's correct, your Honor.

THE COURT: All right.

MR. HUDSON: I think we're short one Defense counsel though.

MR. NAJVAR: Yeah, I have not seen nor heard from him. I assumed he'd be here; I haven't heard anything otherwise. Defense counsel for the County.

THE COURT: Well, he had notice to be here, right?

MR. HUDSON: Yes, your Honor.

THE COURT: And that's with regards to the County Defendants.

MR. HUDSON: Yes.

1 **THE COURT:** The individuals.

2 **MR. HUDSON:** Yes.

3 **THE COURT:** Well, we can set him for a show cause for
4 tomorrow morning as to why he wasn't here at 9:30 in the
5 morning. But I think we can handle some matters here.

6 **MR. HUDSON:** Sure.

7 **THE COURT:** It appears to me and I think that the
8 Defense is trying to argue this; I don't know that the two
9 named Plaintiffs have any standing here.

10 **MR. HUDSON:** I think that's correct, your Honor.

11 **THE COURT:** I mean, the complaint here is that people
12 were -- who voted, their votes were not counted because of some
13 issue involving signatures or otherwise other issues that are
14 allowed to not count a vote.

15 And it's my understanding that what the Plaintiffs,
16 including the ones that want to be added as Plaintiffs here,
17 who are the ones whose votes were not counted, are arguing is
18 that this is a violation of their due process constitutional
19 rights because they're not notified before the election in
20 order to be able to correct any violation; any mistake there is
21 in the application. Or in the mailed in ballot.

22 **MR. NAJVAR:** And the rejection of their ballot.

23 **THE COURT:** Right.

24 **MR. NAJVAR:** That's right.

25 **THE COURT:** My view is that the two candidates do not

1 have standing to complain about somebody else's constitutional
2 rights, and you-all have indicated that this has already been
3 an election contest on behalf of the candidates and that that's
4 already in the state court being decided, so I don't know that
5 we're going to decide that all over again with regards to the
6 two candidates, that they have a standing with regards to
7 somebody else's constitutional rights when we don't even know
8 who they voted for or maybe just left it blank; didn't want to
9 vote for anybody.

10 So, it's hard to understand that the two candidates
11 would have status here, or standing to make this complaint. I
12 understand the actual voters if they want to file this
13 complaint. In fact, you're asking to include them, I believe.
14 The Plaintiffs are asking that.

15 **MR. NAJVAR:** Well, with all due respect, I filed the
16 first amended complaint on November 30th within the Court's --

17 **THE COURT:** Yeah, but you didn't ask for permission
18 to file the amended complaint. And you've included some names.

19 **MR. NAJVAR:** No. Well, that's right but I had the
20 written consent of all the counsel for the Defendants. And
21 under Rule --

22 **THE COURT:** Yes, but under the rules, you're supposed
23 to have a certificate of conference; not just some consent
24 here.

25 **MR. NAJVAR:** That's not in the rule, your Honor.

1 **THE COURT:** The rule is that you're supposed to tell
2 me that somehow you have given them notice and they're opposed
3 to it.

4 **MR. NAJVAR:** Well, it's at the --

5 **THE COURT:** You know what? I'll just let you do it.
6 Rather than having an argument with you over this, I'll let you
7 do this, but in the future, please do it like everybody else
8 does it, okay?

9 But there should be a certificate of conference that
10 says we contacted them about this; they have no opposition to
11 us filing this. And then I know it can be granted.

12 **MR. NAJVAR:** Well, it was in a footnote, and I should
13 have --

14 **THE COURT:** It's a footnote, but it's not a
15 certificate of conference. This footnote is not a certificate
16 of conference. Everybody else does a certificate of
17 conference. And so now you know what I expect.

18 **MR. NAJVAR:** Okay. Understood.

19 **THE COURT:** Okay. I will allow that to be, but they
20 have a motion to dismiss the two candidates and I will grant
21 that. I don't think they have a standing here.

22 However, you are also now trying to substitute
23 somebody else for one of the Plaintiffs who is deceased now; a
24 daughter. But I don't know what her standing would be with
25 regards to the mother's ballot.

1 **MR. NAJVAR:** Well, it's a motion for substitution
2 under the federal rules, and she's standing in the shoes of her
3 mother essentially.

4 **THE COURT:** But her mother -- this is moot;
5 unfortunately, her mother has passed away. And I'm sorry to
6 hear that, but I don't know how -- what relief I could give the
7 mother if she's deceased.

8 **MR. NAJVAR:** Well, the mother --

9 **THE COURT:** I mean, what can I give the mother?

10 **MR. NAJVAR:** -- well, you're right in the sense that
11 the mother can't seek prospective relief like the other voters,
12 but she did have her ballot rejected and so --

13 **THE COURT:** And she had her ballot rejected and
14 there's nothing we can do to make it better for her at this
15 point. She's deceased. It isn't like your estate goes and
16 files this. This is your own personal constitutional right as
17 far as your ballot goes.

18 **MR. NAJVAR:** Well, that's true, your Honor, and I'll
19 just -- I'll concede that. I don't need that Plaintiff to stay
20 in the case to maintain standing rights.

21 **THE COURT:** Right. I understand that. So, I'm
22 telling you that I'm not granting the request that her daughter
23 be substituted. The others remain in the case.

24 **MR. NAJVAR:** Okay. Well, if that's the Court's
25 ruling then I will accept it as the --

1 **THE COURT:** Well, that's the only one that makes
2 legal sense or sense in general. You can't have a cause of
3 action for your constitutional violation if, unfortunately,
4 you're no longer living. And I'm very sorry to hear that. I
5 think she was 80-something; is that correct?

6 **MR. NAJVAR:** She was -- I don't think she was quite
7 80; she was late 70s, I believe.

8 **THE COURT:** Okay. But, you know, it would be kind of
9 odd to say that your daughter then can continue fighting your
10 violation with regards to your casting a vote in an election.

11 **MR. NAJVAR:** Well, I understand, but there is -- I
12 did the research on this and I did -- I wanted to keep her in
13 the case because of, you know, she was excited about this; it
14 was very important to that voter --

15 **THE COURT:** Right. I understand that. I understand
16 that. But whenever somebody has a case and -- we just don't
17 keep on going if there is no longer a cause of action
18 unfortunately when somebody is deceased.

19 **MR. NAJVAR:** Well, like I said, your Honor, I'll
20 accept the Court's ruling of course, and I don't want to
21 belabor the point. I did do the research, you know; there's
22 authorities in the motion that I believe the Court could grant
23 the motion to substitute, but if that's the Court's ruling, we
24 can move on from there.

25 **THE COURT:** Well, what would the Defense do? They

1 have nobody to go examine about the casting of the ballot or
2 anything. I mean, who --

3 **MR. NAJVAR:** Well, right --

4 **THE COURT:** -- they would no longer be able to -- the
5 daughter can't say anything about the -- in the deposition
6 about her mother's ballot.

7 **MR. NAJVAR:** Well, that's true, your Honor, but we
8 did have the --

9 **THE COURT:** Well, that's true. Yes, sir, it is.

10 **MR. NAJVAR:** They never sought to take her deposition
11 and they could have done that. They never sought that, and we
12 submitted her affidavit --

13 **THE COURT:** Okay, but since they didn't, there's
14 nobody to take a deposition of. We haven't really gone very
15 far here. In fact, they claim there isn't even a cause of
16 action.

17 **MR. NAJVAR:** I know they claim that, but I would
18 just --

19 **THE COURT:** They claim that as -- that as a matter of
20 law, there's nothing to pursue here.

21 **MR. NAJVAR:** Well, I understand, and I have a
22 different view of the law, but I mean, the party who declines
23 to take a deposition or discovery regarding a Plaintiff who's
24 named in the case assumes the risk that that Plaintiff might
25 not be there to give the deposition later in the case.

1 **THE COURT:** Well, and unfortunately if the person is
2 no longer available to have a cause of action, well then there
3 is no cause of action for that person.

4 **MR. NAJVAR:** Well, again, your Honor, like I said, I
5 don't need all four of the voters to remain in the case to
6 maintain the case so...

7 **THE COURT:** Right, and you don't have one of them for
8 sure, and you can't just substitute somebody for the sake of
9 it. It isn't like the estate of that individual is entitled to
10 anything at this point. This is a personal right that she had;
11 not that we're going to grant the estate any kind of monetary
12 compensation here.

13 **MR. NAJVAR:** Well, there is a claim for nominal
14 damages, and for damages purposes, that's treated the same as
15 any other monetary damages would be. So, that would pertain to
16 the estate.

17 **THE COURT:** Yeah, but it also -- well...

18 **MR. HUDSON:** If the Court needs argument on that
19 score, we didn't file a response, but I'll just point out that
20 1983 looks to state law to figure out whether an estate could
21 bring an action, looking at Texas state tort statutes to figure
22 out whether that's the case. Injuring a right to vote as
23 purported is neither a personal injury nor a volatile debt and
24 therefore wouldn't have a -- wouldn't be allowed a cause of
25 action under 1983 in any event.

1 **THE COURT:** Well, that's the Court's view, and so
2 I've already said that, yes, the -- we'll continue with this
3 lawsuit with the other individuals, but not the decedent nor a
4 substitution permitting a relative of the decedent, and I'm
5 sorry to hear that somebody's no longer with us.

6 I also will say that the two candidates do not have
7 the right to be complaining about these other individuals and
8 their votes. The candidates have actually had their say so in
9 this -- I think there was an election contest.

10 **MR. NAJVAR:** There was but, your Honor, I can't make
11 this point clear enough. That you are not --

12 **THE COURT:** Because you will not be able to make this
13 point clear enough. The candidates had an election contest.
14 They were not the ones whose ballots were not counted. They
15 have the right in the election contest to have argued that
16 those ballots could have been counted if the judge therefore
17 made a decision there these ballots should not have been thrown
18 out. That's where they had their right for their day in court
19 with regards to this.

20 **MR. NAJVAR:** But your Honor, they didn't have that
21 right. They didn't have that right in Texas courts. And
22 that's in my briefs, and the Defendants have not responded to
23 it.

24 **THE COURT:** In the election contest, they couldn't
25 say that this vote should have been counted? That wasn't

1 brought in front of the judge?

2 **MR. NAJVAR:** No, your Honor. That's -- we filed this
3 complaint --

4 **THE COURT:** So, what did you complain about in the
5 election contest if it wasn't that votes weren't counted?

6 **MR. NAJVAR:** This constitutional -- the claims in
7 this case are constitutional claims that the Texas statutes --

8 **THE COURT:** But the -- constitutional claims are the
9 individuals. The clients -- the candidates, their claim was
10 votes should have been counted. You do that in the election
11 contest.

12 We don't even know who they voted for, so I don't
13 even know why these two would have that right. In the election
14 contest, they could have found out who they voted for.

15 **MR. NAJVAR:** Well, that's right, but we're dealing
16 with two different sets of claims here. And I'm not -- let me
17 make this clear also. We're not asking for any votes to be
18 counted right now. We're asking to change the law.

19 **THE COURT:** You can't. That's not what we're doing
20 here. You're just asking to change the law here.

21 **MR. NAJVAR:** That's right. That's right.

22 **THE COURT:** Okay. But the two candidates are not the
23 ones whose votes were not counted.

24 **MR. NAJVAR:** Well, the case that I relied on, one of
25 the cases I relied on from Florida, the Detzner (phonetic)

1 case, there were organizational Plaintiffs and there was a
2 candidate Plaintiff, Bill Nelson, the U.S. Senate candidate
3 campaign. His standing -- the Florida District Court, federal
4 district court, found that he did have standing to raise the
5 claims on behalf of his potential voters, and the same was true
6 in --

7 **THE COURT:** Well, we don't have his potential voters
8 here. We have these individual voters that were not counted
9 here.

10 **MR. NAJVAR:** Well, that's right. I just -- the state
11 has never -- I've never responded in full to their argument
12 about the candidates' standing because they never -- I didn't
13 have to because the case goes forward anyway because we have
14 standing on behalf of the voters.

15 **THE COURT:** Right. The case goes forward anyway with
16 the people who really have a cause of action if there is a
17 cause of action.

18 **MR. NAJVAR:** Right. And I'm just --

19 **THE COURT:** The individuals whose vote were not
20 counted. The two candidates, they had their day in court with
21 regards to complaining about the election process; they had an
22 election contest. I don't know if that's still in court or
23 where it is and I don't know who won or didn't win, but their
24 votes were counted. The claim here is votes were not counted
25 for these individuals. They were kicked out on some claim of

1 either signatures or some default, and the claim here is you
2 should be given notice before you do that and before the
3 election is over that that's our right to know and that somehow
4 we need to change the election code, that this Court is being
5 asked to therefore say the election code is somehow -- because
6 nobody is saying that they didn't follow the election code.
7 What you're saying is the election code is a violation of the
8 federal constitution here with regards to how these votes are
9 counted.

10 **MR. NAJVAR:** That's correct.

11 **THE COURT:** Okay. And so you've got that cause of
12 action with regards to the ones whose votes were not counted
13 and that's what we're going to continue with.

14 **MR. NAJVAR:** Okay. I'm just making clear for the
15 record since we're talking about this issue that I do believe,
16 and there is authority for the proposition that the candidate
17 Plaintiffs do have standing to maintain these constitutional
18 claims.

19 **THE COURT:** And the reason -- did they know how these
20 people voted?

21 **MR. NAJVAR:** No, but it doesn't matter because it's a
22 facial challenge to the election code as it's written, and the
23 particular facts of any particular vote don't matter once you
24 establish standing.

25 **THE COURT:** Yeah, but I don't know that every

1 candidate could just bring this without having the actual
2 people who were hurt be the ones. Then every candidate could
3 just file it on a regular basis without any showing of
4 anything.

5 **MR. NAJVAR:** Well, it's the same --

6 **THE COURT:** I mean, it's the individual who counts
7 here; it's not the candidates. It's the individuals' rights
8 that are important here.

9 **MR. NAJVAR:** Well, your Honor --

10 **THE COURT:** The candidates have a right -- they could
11 have made this argument.

12 I disagree with you. I think they could have made
13 the argument at the election contest because that's what you
14 do. You complain, you shouldn't have kicked out these ballots.
15 They should have counted. They could have said the signatures
16 are exactly the same; why did you kick them out? We need to
17 count these.

18 **MR. NAJVAR:** Well, you're right, your Honor, but --

19 **THE COURT:** You do that at the election contest.

20 **MR. NAJVAR:** -- your Honor, you're right, but this is
21 not the first case to deal with this kind of issue. The case
22 again from Florida --

23 **THE COURT:** Well, this is also not the first case
24 that deals with an election contest and what you can do there.
25 They filed an election contest. They already had the right to

1 complain about this.

2 **MR. NAJVAR:** Okay, but your Honor, you cannot raise
3 constitutional challenges to the election code in a Texas court
4 election contest. That's the unanimous decision of the Texas
5 Supreme Court and the Courts of Appeals, and I've cited several
6 of them. And there's been --

7 **THE COURT:** Okay, but I don't think they have a cause
8 of action here. Okay?

9 **MR. NAJVAR:** Okay. Well, I -- just for the record, I
10 would point out, your Honor, that you can't raise
11 constitutional challenges in a Texas election contest so we did
12 not. That's why we filed this --

13 **THE COURT:** Okay. Well, then why did you, first of
14 all, just file it with their names and then you ran and started
15 getting other names? You must have been somewhat concerned
16 about it.

17 If this was exactly just their case, you would have
18 kept it that way. Once they filed a motion to dismiss saying
19 they have no standing, you went and found these others
20 individuals and decided to throw them in here. I don't have a
21 problem with that. I think they have a cause of action.

22 They thought they had a very strong motion to
23 dismiss, and perhaps maybe you thought that the Court might
24 take that seriously because then you decided that you were
25 going to add these individuals.

1 **MR. NAJVAR:** Well, I'll concede that, yes, it's a
2 very difficult argument. And you know, I think the Court could
3 rule either way as to the candidates' standing.

4 What I'm saying is that I've cited authority to the
5 Court. They haven't cited any.

6 **THE COURT:** Okay. And so I've already ruled and so
7 we're leaving it that way.

8 **MR. NAJVAR:** Okay.

9 **THE COURT:** And we have -- we're ready to proceed
10 with the ones that I think have standing here.

11 **MR. NAJVAR:** Yes, your Honor.

12 **THE COURT:** And they're going to say that there is no
13 constitutional violation and so they will file a motion; I
14 suspect, they're trying to already make that argument in their
15 motion for summary judgment.

16 And I would like to have you, now that we know who
17 the parties are here, if you would like to go ahead and file
18 your response to that so we can set a hearing date on that.

19 **MR. NAJVAR:** Okay. Well, I was under the impression
20 this was the final motions hearing. All the responses have
21 been filed.

22 **THE COURT:** Well, no, it's not because of the fact
23 that we were still -- had the discussion about who the parties
24 are here.

25 **MR. NAJVAR:** Okay.

1 **THE COURT:** So, you're ready to go on what we have,
2 just that; nothing else? Nobody needs to do anything else?

3 **MR. NAJVAR:** I think the briefing is complete and the
4 Court can rule based on the papers on file.

5 **THE COURT:** Do you agree with that or not?

6 **MR. HUDSON:** Our briefing is complete, your Honor.

7 **THE COURT:** Okay. Well, then I'll go ahead and spend
8 more time reading those motions for summary judgment as opposed
9 to the ones that were just with regards to the parties because
10 I thought you-all had more discovery to do, but apparently not.
11 And so, we'll just set a hearing date on the motions for
12 summary judgment. Nobody is going to want -- now we know that
13 at least one part of this was granted with regards to the two
14 candidates.

15 **MR. NAJVAR:** Okay.

16 **THE COURT:** And that we are less one Plaintiff
17 because the Court didn't allow a substitution. And so, it's a
18 case of the individuals whose votes were not counted that are
19 filing the lawsuit.

20 **MR. HUDSON:** And let me take that back then, your
21 Honor. Now that the Court has clarified, I do think at this
22 point if the Court is going to permit those parties, we would
23 like to depose them before proceeding with the summary judgment
24 motions.

25 **MR. NAJVAR:** Your Honor, there -- in my view of this

1 matter, the facts here are very straightforward. I mean, and
2 there's no reason you would need -- I mean helping the
3 Plaintiffs, there's no reason you would need those voters'
4 testimony. The fact is they submitted their ballots --

5 **THE COURT:** Well, if it's going to help your clients,
6 why be opposed to it?

7 **MR. NAJVAR:** Well, because it's going to delay the
8 resolution of the case.

9 **THE COURT:** Well, not by much. I think you-all can
10 do it quickly; don't you think?

11 **MR. NAJVAR:** Well, I'm sure we can, but it's also
12 going to increase the expense.

13 I mean, if they want do that, but I would point out
14 also, we've -- they had notice -- they had the opportunity to
15 respond before we filed the amended complaint naming those
16 Plaintiffs. So, I sent the draft complaint to them --

17 **MR. HUDSON:** Actually the amended complaint was filed
18 on November 30th; the most recent amended complaint I believe
19 was filed in January with the estate.

20 **MR. NAJVAR:** Well, right --

21 **MR. HUDSON:** After all of the deadlines had passed on
22 the scheduling order.

23 **MR. NAJVAR:** My point, your Honor, was that they -- I
24 had given them notice and the identities of the additional
25 Plaintiffs that were later added on November 30th, but they had

1 notice and they had the relevant documents. The application
2 and the --

3 **THE COURT:** Okay, but so far there has been no
4 discovery.

5 **MR. NAJVAR:** Not with respect to those voters.

6 **THE COURT:** Has there been discovery as to what?

7 **MR. NAJVAR:** The depositions of some of the ballot
8 board member Defendants and the depositions of the two
9 candidate Plaintiffs have been taken.

10 **THE COURT:** Okay. Can you-all do this in 30 days?

11 **MR. NAJVAR:** I think 30 days would be a little short
12 for me; I've got a couple of briefing --

13 **THE COURT:** Can we do it in 45 or 60 days?

14 **MR. NAJVAR:** Certainly.

15 **THE COURT:** Okay. Which do you-all prefer?

16 **MR. HUDSON:** Let's have 60 days to do it, your Honor.

17 **THE COURT:** Do you have a problem with that?

18 **MR. NAJVAR:** No, sir.

19 And, your Honor, I assume this means we'll be
20 amending our substantive motions --

21 **THE COURT:** Right. And I'm going to give you
22 deadlines for that also.

23 **MR. NAJVAR:** Okay.

24 **THE COURT:** Okay. You-all have until May 21st within
25 which you-all can depose these individuals, and any motion for

1 summary judgment that's going to be different has to be filed
2 by June the 17th with the proper deadlines of when it's going
3 to be responded to, and then we'll have a hearing on July the
4 23rd at 4:00 p.m. on any pending motions for summary judgment
5 and their responses.

6 **MR. NAJVAR:** July 23rd, 4:00 p.m.?

7 **THE COURT:** Yes. Yes.

8 **MR. NAJVAR:** Okay.

9 **THE COURT:** Do you-all need anything else from me?

10 **MR. NAJVAR:** I don't think so, your Honor.

11 **MR. HUDSON:** No, thank you, your Honor.

12 **THE COURT:** Okay. If you-all don't have anything
13 else, you-all can be excused. Thank you.

14 **MR. NAJVAR:** Thank you.

15 **(This proceeding was adjourned at 3:18 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", is written over a horizontal line.

Signed

March 28, 2019

Dated

TONI HUDSON, TRANSCRIBER